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Nos. 384 and 385

In the Supreme Court of the United States

OCTOBER TERM, 1948

CORNELL STEAMBOAT COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

BOSTON TOW BOAT COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion, findings of fact, and conclusions of law of the specially constituted district court (R. 123–136) are not yet reported. The reports of Division 4 of the Interstate Commerce Commission (R. 24–43) and of the full Commission

(R. 45–58) dealing with the Cornell Steamboat Company (hereinafter referred to as Cornell), appellant in No. 384, appear in 250 I. C. C. 301 and 250 I. C. C. 577. The report of Division 4 dealing with the Boston Tow Boat Company, appellant in No. 385, appears in 250 I. C. C. 743, but is not part of the record before this Court.[1]

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[1] The Boston Tow Boat Company sought permission and was permitted to intervene in the suit instituted by Cornell, solely for the purpose of asserting its general contention that towers were not common carriers by water subject to the Interstate Commerce Act (R. 68–70). Although Division 4 of the Commission on May 22, 1943, had held the Boston Tow Boat Company to be a common carrier by water and granted it a certificate of public convenience and necessity to continue operations as such, this order was not directly attacked in the present suit and the record before the Commission upon which the order was based was not introduced before the court. The court's decree (R. 136–137) likewise does not purport to deal with the Boston Tow Boat order. In fact, the court would not have had jurisdiction to do so, since the order of the full Commission denying Boston Tow Boat's petition for reconsideration was not entered until August 2, 1943, subsequent to the court's decision in the *Cornell* case. Under Section 17 (9) of Part I of the Interstate Commerce Act (49 U. S. C. 17 (9)), such an order is a jurisdictional prerequisite to a suit to set aside an order of the Commission. Furthermore, the Boston Tow Boat Company has directly attacked this order in another suit in the United States District Court for the District of Massachusetts, *Boston Tow Boat Co.* v. *United States*, Civil No. 2448, which is being held in abeyance pending the outcome of this case. It is evident therefore that the position of the Boston Tow Boat Company in the present appeal is virtually only that of an *amicus curiae*. Consequently, this brief will not deal further with the facts relating to the Boston Tow Boat Company.

JURISDICTION

The final decree of the district court was entered July 30, 1943 (R. 136–137). Petitions for appeal were filed by Cornell (R. 138) and by Boston Tow Boat Company (R. 141) on August 10, 1943, and August 30, 1943, respectively. The appeals were allowed on the same dates on which the respective petitions were filed (R. 137–138; 141–142). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345); and Section 316 (a) of the Interstate Commerce Act, Part III, c. 722, 54 Stat. 946 (49 U. S. C. 916 (a)). Probable jurisdiction was noted by this Court on October 25, 1943 (R. 147).

QUESTIONS PRESENTED

The ultimate question concerns the validity of an order of the Interstate Commerce Commission subjecting Cornell to its jurisdiction under Part III of the Interstate Commerce Act (49 U. S. C. 901–923) as a common carrier by water, and granting it a certificate of public convenience and necessity to continue operations as such.

Subordinate questions are:

1. Whether the Commission properly held that Cornell, to the extent that it is engaged in towing

for hire cargo-carrying vessels of others, not themselves common carriers, is "engaged in transportation by water" and is a "water carrier" within the meaning of Part III of the Interstate Commerce Act.

2. Whether the Commission properly held that as to such operations Cornell was a "common carrier by water" and not a "contract carrier by water" within the meaning of the Act.

3. Whether, if the Act is construed as designating Cornell a "common carrier by water," it is within the constitutional powers of Congress.

4. Whether the Commission properly held that Cornell's operations are in "interstate commerce" within the meaning of the Act.

STATUTE INVOLVED

The pertinent provisions of Parts I, II, and III of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 61–75.

STATEMENT

By application filed with the Commission on May 21, 1941, Cornell sought a permit under the so-called "grandfather" clause of Section 309 (f)[1] of Part III of the Interstate Commerce Act (49 U. S. C. 909 (f)) to continue operations as a con-

[1] Section 309 (f) forbids contract carriers by water to operate without a permit issued by the Commission authorizing such operations as in the public interest. However, as in the provisions of the Act dealing with motor carriers, in this Section there is a "grandfather" clause, which authorizes the granting of a permit without fur-

tract carrier by water in towage service in interstate commerce from and to all points on the Hudson River between Waterford, New York, and New York City harbor points located in New York or New Jersey on the waters of the lower Hudson, and the adjacent waters of New York Harbor (R. 25, 74–82). The application prayed that if the facts showed that Cornell, although applying for a permit as a contract carrier, was entitled to a certificate as a common carrier, the application be treated as one for the appropriate form of authority (R. 25, 72). The application further stated that it was filed without prejudice to Cornell's contention that in its performance of towage services for hire it was not a carrier and did not carry or transport any passengers or property and that it was not subject to the Act (R. 25, 78).

On the same day, Cornell filed a petition to dismiss[4] its application on the grounds that in ren-

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ther proof of public interest to carriers who were in bona fide operation on, and continuously after, January 1, 1940. Section 309 (a) requires common carriers by water to secure certificates of public convenience and necessity from the Commission, but contains a similar "grandfather" clause.

[4] This procedure was apparently authorized under a general notice issued by the Commission on October 24, 1940, which stated:

> If water carriers are in doubt as to whether a certificate or permit is required for all or any part of their operations, they will be able to protect all rights by including such operations within the application, and the Commission's instructions will make

dering towage service, it was not a carrier and not engaged in transportation within the meaning of the Act, and therefore not subject to the Act (R. 11–12, 25). The petition further prayed that, without prejudice to its request for dismissal on those grounds, petitioner be held not subject to the Act insofar as its towage was performed wholly intrastate in the State of New York, irrespective of whether the vessels towed or their cargoes were moving in interstate commerce (R. 12, 25).

Rail carriers in official territory [4] and the Northeastern Inland Waterways Association, Incorporated, intervened at the hearing (R. 25). The Atlantic Coastwise and Inland Water Carriers Association, Incorporated,[5] and Mississippi Valley Barge Line Company were permitted to intervene

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it clear that this can be done without prejudice to any contention that they may wish to make that a certificate or permit is not required for such operations. [Commerce Clearing House, Federal Carrier Service, par. 14,102.]

Similar procedure has been followed with respect to railroad abandonment certificates. See *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469, 474. While the Commission's order was held not reviewable in that case, the subsequent decision of this Court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 133–134, and its rejection of the "negative order" doctrine, clearly indicate that the present order is reviewable.

[4] For a definition of the scope of official territory, see *Iron and Steel Articles*, 155 I. C. C. 517, 520, fn. 3.

[5] National Water Carriers Association, Inc., the successor to this organization, intervened as a defendant before the district court and is an appellee here (R. 66–68, 128).

for the purpose of filing exceptions, and the Boston Tow Boat Company for the purpose of participating in oral argument (R. 25-26). Most of the intervenors contended that Cornell should be regulated as a common carrier (R. 26).

In its decision of June 15, 1942, Division 4 of the Commission reached the ultimate conclusion that Cornell "was in bona fide operation in interstate commerce as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels between all points within the limits of New York Harbor, New York and New Jersey, as those limits are defined in our order of March 26, 1941, entered in Ex Parte No. 140,* and on the Hudson River between New York Harbor and Waterford, New York, and all intermediate points; that such operation has been continued since that date; and that applicant is entitled under the 'grandfather' clause of section 309 (a) of the Act to a certificate of public convenience and necessity authorizing continuance of such operation, * * *." (R. 42-43). The division denied Cornell's petition to dismiss its application (R. 43), and an appropriate certificate was granted (R. 43, 44).

After written and oral argument, the full Commission, in its decision of February 2, 1943, affirmed Division 4's ultimate conclusion, except to

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* The Commission did not issue a report in this case.

the extent that it authorized operations between points within the limits of New York Harbor, as prescribed in the Commission's order in *Ex Parte No. 140, supra* (R. 53, 54). It was pointed out that, as to towage performed within the prescribed limits of New York Harbor, Cornell was not a party to any arrangement for the through carriage of barges or the cargoes therein from or to points without the State of New York (R. 53). Consequently, it was found that such transportation was within the terms of the exemption contained in Section 303 (g) [1] of Part III of the Act (49 U. S. C. 903 (g)), and that no certificate was required with respect to it (R. 53). A certificate, corrected accordingly, was issued, which authorized operations between points within New York Harbor

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[1] This section provides:

> Except to the extent that the Commission shall from time to time find, and by order declare, that such application is necessary to carry out the national transportation policy declared in this Act, the provisions of this part shall not apply (1) to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not a part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors, * * *.

The limits of New York Harbor within which Cornell's transportation was held to be exempt under the above Section were prescribed by the Commission in its order in *Ex Parte No. 140* (see p. 7, *supra*).

(New York and New Jersey) and Waterford, New York, and intermediate points on the Hudson River (R. 53, 58–59).

The pertinent facts concerning Cornell's operations as they appear from the report of Division 4 may be summarized as follows (R. 26–29):

Cornell was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president. At the time of the hearing, it owned and operated a fleet of approximately 33 tugboats. One scow is maintained in connection with its regular equipment, but the company does not own or operate any barges or other type of carrying craft. No cargoes of merchandise or passengers are carried on any of the tugboats. The tugboats are used exclusively in towing for Cornell's customers, over 70 percent of whom are shippers who own or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers. (R. 26.)

Cornell renders towing services the year around within the limits of New York Harbor, and harbors contiguous thereto, as those limits were defined by the Commission in its order of March 26, 1941, entered in *Ex Parte No. 140* (see pp. 7–8, *supra*). It also renders towing services on the Hudson River up as far as Waterford, New York, above Troy, New York, and the entrance to the Erie Canal, but those operations are suspended during the season when ice prevents them, which

is generally from the early part of December to about the middle of March. (*Ibid.*)

Cornell's records for the year 1940, which it considers fairly representative of its annual business for the past 10 years, show that 4.4 percent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River and points outside the harbor in New York State. However, much of the transportation between up-river points and harbor points in New York was also found to be in interstate commerce, for the New York-New Jersey boundary follows the middle of the river (4 Stat. 708) and would be crossed in navigating large flotillas of barges up or down the river. (R. 26–27.) See fn. 32, *infra*, pp. 51–52.

By far the largest part of Cornell's business is done on the contracts entered into for a period of years, while some contracts run for a single year, and the balance consists of miscellaneous contracts arranged from day to day. From 12 to 13 percent of its business is of the day-to-day type. Arrangements for all of its towing services, whether for a period of time or for an individual operation, are based on separate agreements or contracts. The vessels towed are scows which carry their cargoes on deck and barges which carry the cargoes below deck in the hold. Under the form of contract used, the shipper does not agree to make shipments; but if it does make

shipments, it agrees to employ Cornell's towage services, and to pay therefor at the rates stated in the contract, which are based upon the capacities of the barges described therein. If reductions are made by Cornell in the rates charged other shippers for like service, the contract rates are to be reduced to the same level; and if Cornell's fuel or labor costs are increased due to strikes or other causes beyond its control, the contract charges are to be increased provided the increases are also made effective as to other customers for similar services. Barges are not deemed to be in Cornell's custody or under its responsibility while lying at docks or not being actually towed. The term of the contract is stated, and provision is made for its continuance from year to year if not canceled at the end of the year. Such a contract, prior to the requirement of law for the publication of tariffs, served the same purpose as a common carrier published tariff, which fixes rates and conditions for future acceptance. In addition, it reserved to Cornell the sole right to tow such traffic covered by the contract as the shipper might decide to move by barge. (R. 27.)

In fixing its rates, Cornell's only interest in a cargo is with respect to the size of the scow or barge on which it is loaded, and the weight of the cargo which controls the load-water draft of the barge. Rates charged for towing are lower for

the larger units. For example, the rate per ton for towing a barge with a minimum of 1,500 tons is less than the rate per ton for a 300-ton-minimum barge. The rate is also lower if the scow or barge is towed with others in a flotilla. Cornell maintains a schedule for its customers under which a tow leaves New York Harbor daily for points as far north as Poughkeepsie, New York, and every other day for Albany, New York, and other points on the upper Hudson. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. In flotilla towing, the rates are the same to all customers for equal tonnages. If a customer desires individual service the rate is necessarily higher. From 85 to 90 percent of Cornell's business is in those flotillas. The flotilla may consist of from 5 to 50 barges. Cornell has practically no limit on such flotillas, but takes all that is offered and adds such additional tugs as may be required. (R. 27–28.)

No offer of towing services is advertised by Cornell in any daily papers or trade journals. Its witness, the company's president, thought that a simple announcement of towing services had been carried in Bullinger's Guide for many years. However, the 1939–1941 editions of that guide do not disclose any such announcement. Its busi-

ness has been built up with individual customers over the many years of its operation, and, as the witness said, "The business has been going on for so long that everybody knows it." Cornell has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, unsatisfactory credit, and when the requested service could not be rendered without injuring one of the regular customers. How such injury could result was not explained, and, in view of the evidence that there is practically no limit to the number of barges Cornell can include in a flotilla, the Commission found the above statement to be "unintelligible." Unless given a release from all liability, including liability for negligence, Cornell frequently declines to perform towage. (R. 28.)

Cornell does not issue bills of lading or similar documents with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the tugboat nor any other of Cornell's employees has anything to do with the cargoes on the vessels in the tow. Cornell generally has no interest in and no "official knowledge" of the origin or final destination of the cargoes, and when the towing service is complete with the docking of the vessel at the place agreed upon, no further services are rendered. No arrangements for any through move-

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ment, of which the towing services might be a part, are ever entered into by Cornell with any other carrier. It claims a lien on the barges towed for its towing charges, but no lien on the cargoes. When the barge is a chartered one, Cornell relies on the credit of the charterer. (R. 28–29.)

The report of the full Commission contains the following relevant discussion concerning the interstate nature of Cornell's operations (R. 51–53):

> At the reargument, and in its supplemental brief filed at that time, applicant, while admitting that the geographical boundary between New Jersey and New York follows the middle of the river (4 Stat. L. 708), urges that the State of New York has jurisdiction over the waters of the Hudson River lying west of Manhattan Island to the low-water mark on the New Jersey shore, under an agreement entered into by the two States in 1833. That agreement was ratified by the legislatures of the two States and approved by Congress. It fixes the boundary at the midde of the river and bay, but grants to the State of New York exclusive jurisdiction over all the waters of the Bay of New York and of the Hudson River lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil Creek to low-water mark on the New Jersey side thereof, subject to certain specified rights of property and of jurisdiction of the State of New Jersey, one of which is the

exclusive right of property in said to land under the water lying west of the middle of the bay and river; a second is that the State of New Jersey shall have exclusive jurisdiction over wharves, docks, and improvements on the shore of that State, and over all vessels aground or fastened to any wharf or dock on that shore, except that said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the State of New York; and another is the regulating of fisheries west of the middle of said waters. * * *

* * * * *

From the north end of Manhattan Island northward to the point where the northern boundary of New Jersey reaches the Hudson River is some 7 or 8 miles. Applicant therefore asserts that only for this distance would its traffic be outside the waters that are under the jurisdiction of the State of New York. It is not necessary for us to pass upon the question of whether the movement of applicant's traffic through the waters of the western half of the Hudson River lying west of Manhattan Island constitutes it interstate commerce, although this applicant in *Cornell Steamboat Co. v. Sohmer, supra* [235 U. S. 549], contended that it was such, since concededly movement through the waters of the western half of the river north of Manhattan Island is through waters under the jurisdiction of the State of New Jersey. The interstate

> character of applicant's traffic is determined, not by the number of miles that it moves outside the State of New York, but by the fact that it *does* move outside the State.

The full Commission also affirmed the principal subordinate findings of Division 3. Thus, it stated (R. 48, 53–54):

> The finding that towers engaged in interstate towing for the general public are subject to part III of the act, except to the extent that specific exemptions are provided, is affirmed.
>
> * * * * *
>
> We affirm the conclusion of division 4 that transportation between two points in the State of New York, passing through New Jersey territorial waters en route, is within the jurisdiction conferred on this Commission by part III of the act.
>
> * * * The evidence, as recited by the division, warrants the ultimate finding of fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service, and the conclusion that such a holding out, accompanied by performance, constitutes one a common carrier.

Suit to set aside the Commission's order was instituted by Cornell against the United States and the Commission in the United States District Court for the Southern District of New York on

April 2, 1943 (R. 1). A specially constituted three-judge court, after final hearing at which the record before the Interstate Commerce Commission was introduced in evidence, issued an opinion written by Circuit Judge Frank, together with findings of fact and conclusions of law, on July 9, 1943 (R. 123–136). On July 30, 1943, it issued its final decree and judgment dismissing the petition (R. 136–137).

SUMMARY OF ARGUMENT

I

Part III of the Interstate Commerce Act, which was added by the Transportation Act of 1940, is modelled after Parts I and II, and precedents under those parts are therefore entitled to much weight in construing Part III. It is evident from the language and the legislative history of the Transportation Act of 1940 that Congress intended by that Act to achieve equality of regulation between railroads and competing forms of transportation. Towers by water compete with railroads and other forms of transportation, much as do other water carriers which actually carry cargo instead of towing the cargo-carrying vessels of others. Consequently, the regulation of towers must be considered to have been within the general Congressional purpose. The specific definitions contained in Part III clearly show that towers, though they furnish only motive power,

were subjected to the Commission's jurisdiction. Towers are engaged in "transportation" within the broad language of Part III, and even in the dictionary sense. Furthermore, the fact that Section 303 (f) (2) specifically exempts from the Commission's jurisdiction towage performed for common carriers, makes it plain that towage performed for shippers (such as that done by Cornell), which is not within the exemption, was intended to be included as "transportation."

Part III makes all those who either "hold out to the public" to engage in water "transportation" or engage in such "under individual agreements," "water carriers." It does not require that such persons shall have been considered common carriers at common law, and the fact that towers at common law were not subjected to the strict liability of a common carrier is of no significance here. Moreover, it appears from Section 320 (d) that Part III does not purport to modify any common-law rules of liability. Congress instead adopted substantially the same test to determine whether one was a "water carrier" as this Court had applied in determining whether one was a railroad carrier under Part I in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 220–221, namely, whether the person engages in transportation as a "public calling." Since Cornell's towage is for shippers, it is engaged in a "public calling," and either

"holding out to the public to engage in transportation" or engaging in "transportation under an individual agreement." Consequently, it is a "water carrier" within the meaning of Part III. Numerous cases holding railroads to be common carriers engaged in railroad transportation under Part I and other federal regulatory Acts, though they furnished only motive power and no cars, also strongly support the conclusion that towers who are engaged in similar activities by water, are subject to Part III. *E. g., United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296, 305; *United States* v. *California*, 297 U. S. 175.

The Commission's conclusion that Cornell held itself out to the general public to engage in transportation, and that it was therefore, under Section 302 (d), a common rather than a contract carrier is supported by substantial evidence. In view of this, and in view of the fact that the Commission employed the correct statutory test, its conclusion is binding upon this Court. The Commission, with judicial approval, has consistently held that a person does not engage in transportation "under individual contracts or agreements" and is therefore not a "contract carrier" under the Interstate Commerce Act unless he specializes either in the nature of the physical operations or in respect to the shippers served. *Doyle Transfer Co.* v. *United States*, 45 F. Supp. 691 (D. D. C.) Cornell does

not conduct specialized operations so as to make it a "contract carrier" under this test.

To construe Part III as subjecting Cornell to regulation as a "common carrier by water" is not to give it an unconstitutional construction. Neither the Act nor the Commission's construction does unconstitutional violence to common law conceptions of common and contract carriers within the theory of certain decisions by this Court holding that contract carriers cannot by legislative fiat be converted into common carriers and regulated as such. *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 715 (S. D. N. Y.); *Doyle Transfer Co.* v. *United States*, 45 F. Supp. 691, 696–697 (D. D. C.) In any event, more recent decisions of this Court have rejected the theory of these earlier cases, and held that there is no closed category of "business affected with a public interest" which can constitutionally be subjected to economic regulation. *Nebbia* v. *New York*, 291 U. S. 502; *Olsen* v. *Nebraska*, 313 U. S. 236. Likewise, the fact that at common law towers were regarded as "noncarriers" so far as liability was concerned, is no constitutional bar to their being considered common carriers for purposes of a regulatory Act. *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211.

II

On the basis of Cornell's admissions, the Commission properly concluded that as a matter of

fact in operating between New York points Cornell frequently traversed the territorial waters of New Jersey. The Commission properly held also that transportation from one state through another state and back to the first state constituted "interstate commerce" within the meaning of Part III. Such transportation not only falls within the literal definition of "interstate commerce" in Part III, but has long been held by the Commission and the courts to be such within the meaning of the virtually identical provisions of Part I. *Missouri Pacific R. R. Co. v. Stroud*, 267 U. S. 404; *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269, 271–272 (C. C. S. D. N. Y.). In view of the general legislative purpose in the Transportation Act of 1940 to promote equality of regulation between railroads and other forms of transportation, Part III must be given a construction consonant with that given Part I. The fact that in Part II Congress used different language showing more specifically that such transportation was considered "interstate commerce" for purposes of that Part does not indicate that a different result was intended under Part III. If any such result had been intended, the different language of Part I which had been judicially construed to mean the same thing as that found in Part II, would not have been employed in Part III. This Court's decision in *Cornell Steamboat Co. v. Sohmer*, 235 U. S. 549, that operations of

this same type by Cornell did not constitute interstate commerce excluded from the taxing power of New York is of no significance here, for state regulation rather than taxation of this same type of transportation has been forbidden as an unconstitutional burden upon interstate commerce. *Hanley* v. *Kansas City Southern Ry Co.*, 187 U. S. 617. Furthermore, the state's power to tax and regulate is not the terminal boundary of federal power under the commerce clause. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311; *Wickard* v. *Filburn*, 317 U. S. 111, 120–122.

ARGUMENT

I

THE COMMISSION PROPERLY CONCLUDED THAT CORNELL WAS ENGAGING IN "TRANSPORTATION" AND WAS A "COMMON CARRIER BY WATER" WITHIN THE MEANING OF PART III OF THE INTERSTATE COMMERCE ACT

A. CORNELL WAS ENGAGED IN "TRANSPORTATION" AND WAS A "WATER CARRIER" AS DEFINED IN PART III

Inasmuch as this is the first case to reach this Court relating to the provisions of Part III of the Interstate Commerce Act, added by the Transportation Act of 1940 (54 Stat. 898), it appears desirable, before considering the particular statutory provisions involved, to examine the scope of Part III generally. This Part imposes numerous obligations upon common carriers by water. They are required: to establish reasonable practices,

reasonable through-routes with other carriers, and reasonable, nondiscriminatory and nonprejudicial rates; to transport only at rates published in tariffs required to be filed with the Commission; and to secure certificates of public convenience and necessity in order to operate. Sections 305, 306 (a)-(d), 309 (a) (49 U. S. C. 905, 906 (a)-(d), 909 (a)). More limited obligations are placed upon contract carriers by water. They are required to file their contracts and schedules of minimum rates with the Commission and not to transport for lower rates than those named in the filed schedules; to establish reasonable minimum rates; and to secure a permit in order to conduct any operations. Sections 306 (e), 309 (f) (49 U. S. C. 906 (e), 909 (f)). The Commission is empowered, either upon complaint or its own motion, to enforce these obligations. Section 304 (e) (49 U. S. C. 904 (e)). Furthermore, it is empowered to regulate the transfer of certificates and permits; to prevent dual operations by the same persons as common and contract carriers unless such is found to be in the public interest; and, with respect to both types of carriers, to require, and prescribe the form of, periodical reports and accounts. Sections 310, 312, 313 (49 U. S. C. 910, 912, 913).

It is apparent from a comparison of these provisions and the definitions contained in Section 302 of Part III with those in Parts I and II

of the Act, dealing respectively with rail and water carriers, that the language of Part III is modelled closely after the language of the two earlier Parts. Consequently, judicial and administrative precedents construing these earlier Parts are entitled to great weight in construing Part III. The legislative history of the Transportation Act of 1940, furthermore, indicates that Congress intended just such a result.[8]

Also, it is evident, both from the language [9] and the legislative history [10] of the Transportation Act of 1940, that Congress intended by that Act to bring about equality of regulation between com-

[8] S. Rep. No. 433, 76th Cong., 1st sess., p. 4, states:

> The present provisions of the Interstate Commerce Act have been redrafted in what is considered a more logical and orderly manner so as to apply to the newly regulated carriers, saving so far as possible the existing language so that full advantage may be taken of the many interpretations, both judicial and administrative, which have been put upon the respective sections. * * *

[9] The declaration of policy contained in that Act (54 Stat. 899) states:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, * * * to encourage the establishment and maintenance of reasonable charges for transportation services, without * * * unfair or destructive competitive practices; * * *.

See also Section 303 (e), Appendix, *infra*, pp. 68–69.

[10] Congressional intent to secure equality of regulation between competing forms of transportation is manifested

peting forms of transportation. Congress felt that it was unfair to subject to regulation, as it had done in the past, certain forms of transportation, such as railroads and motor carriers, and to permit their competitors, such as water carriers, to continue to be unregulated. That Cornell and

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by the following statement contained in S. Rep. No. 433, 76th Cong., 1st sess., pp. 2–3:

> For many years it has been the view of keen students of the transportation problem that there has been no consistent national policy with respect thereto. One reason urged in support of that view is that while the principal haulers of traffic and passengers, the railroads, have long been strictly regulated—as have, since 1935, motortrucks and busses engaged in interstate transportation—other forms of transportation are developed at public expense and without supervisory regulation. The net result of such a policy is inequality between various forms of transportation. As has been so often said, in 1887, when the original act to regulate commerce was passed, directed to correct abuses by railroads, the railroads had a monopoly on transportation. In later years competitive forms of transportation have developed with such rapidity that no one now urges that there is any such monopoly. * * * It has also been urged, and it seems sound, that there is no equality in treatment when the railroads, and lately the motor vehicles, are strictly regulated, and other forms of transportation are regulated, if at all, to a much lesser extent.
>
> * * * Consequently the remaining remedy is to so extend regulation to competing forms of transportation, other than air, which only recently was placed under the Civil Aeronautics Authority, and retaining to each such lawful advantages as are inherent therein, so as to, as nearly as possible, equalize them and put them on a common footing, at least from a regulation standpoint. * * *

other like towers are an important competitive factor so far as railroads, motor carriers, and other water carriers are concerned can admit of no doubt."[11] It is also apparent that towers, in so far as they tow for shippers, compete with railroads and motor carriers much as do cargo-carrying water carriers. Regulation of the towage for shippers, who are not themselves carriers,[12] which constitutes the bulk of Cornell's operations, can be accomplished only through direct regulation of the tower, since the Act nowhere purports to regulate such persons for

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[11] The following testimony by Cornell's president so indicates (R. 100):

> Exam. WILKINS. The Commission would like to know what your competition is.
>
> The WITNESS. I think that we are the best towers on the Hudson River. We have competition of all kinds.

It is also indicated by the fact that the railroads and various associations of water carriers appeared in opposition before the Commission, and one such association intervened as a defendant in the district court and is an appellee here (see fn. 5, 6, *supra*).

[12] The Commission pressed upon the status of only such part of Cornell's operations (R. 35, 43). It pointed out that its remaining operations, towage for other water carriers, might be exempt under Section 303 (f) (2) (Appendix, *infra*, p. 70), which provides that certain towage operations for water carriers shall be considered to be part of, and regulated in the same manner as transportation performed by the water carriers. But it pointed out that no determination could be made upon this record as to whether such operations fell within this exemption, "because applicant did not make a full disclosure of the facts with respect to such towage" (R. 43).

whom the towing is done. Merely in the light of these general considerations, it is plain that Congress intended towers such as Cornell to be regulated by the Commission under Part III of the Act.

Moreover, certain specific language of Part III requires the same result. Section 302 (c) states that the term "water carrier" means "a common carrier by water or a contract carrier by water." In Section 302 (d) and (e), "common and contract carriers by water" are respectively defined. The term "common carrier by water" is defined to mean "any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property * * * for compensation." The term "contract carrier by water" is defined to mean one who engages in the same transportation "under individual contracts or agreements." Section 302, in subparagraphs (f), (g), and (h), respectively, defines the terms "vessel," "transportation facility," and "transportation." "Transportation" is defined to include not only the "use of any transportation facility," but also "all services in or in connection with transportation." "Transportation facility" includes any "vessel," as well as "any other instrumentality or equipment of any kind, used in or in connection with transportation by water." "Vessel" is defined to mean "any watercraft or other artificial contrivance of whatever descrip-

tion which is used, or is capable of being, or is intended to be, used as a means of transportation by water."

Momentarily disregarding the question whether Cornell's operations are interstate, it is obvious first that though it furnishes only motive power, it does "engage in transportation of property" by water for compensation" within the above statutory language. Accordingly, Cornell's tugs are "vessels," as above defined. Being "vessels," or being "any other instrumentality or equipment of any kind, used in or in connection with transportation by water," these tugs are also a "transportation facility." Since Cornell in operating its tugs thus makes "use of [a] transportation facility," it engages in "transportation" within the meaning of the Act. And even if it could not be said that Cornell engaged in "transportation" under the foregoing theory, it still must be considered to be so engaged in that, in any event, it furnishes "services in or in connection with transportation." Furthermore, though Congress has meticulously sought to define "transportation" in its own broad terms, rather than to rely upon the common understanding of that term, it is apparent, nevertheless, that Cornell is engaged in transportation even in the ordinary dictionary sense of the word. For, as the Commission and the dis-

"It is to be noted that the Act uses the broad term "property," rather than a more restrictive term such as "merchandise." Certainly the barge of another is "property" within the meaning of the Act.

trict court pointed out (R. 35, 135-136), transportation is defined specifically in the nautical sense in Funk and Wagnalls Standard Dictionary to mean: "To haul (a vessel) about a harbor by hawsers."

The only specific reference to towage in Part III strongly buttresses the conclusion that the type of towage performed by Cornell is "transportation" subject to that part. Section 303 (f) provides that the provisions of this Part shall not apply:

> (1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II, incidental to transportation subject to such parts, in the performance * * * of * * * *towage;* but such transportation shall be considered to be transportation subject to part I when performed by such carrier by railroad, and transportation subject to part II when performed by such motor carrier.
>
> (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to part II, or a water carrier subject to this part, in the performance * * * of * * * *towage;* but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by rail-

road, express, motor vehicle, or water to which such services are incidental. [Italics supplied.]

Cornell (Br. 21) describes this Section as exempting towage services "even when performed for carriers subject to the Act." Plainly, that is a misreading of the language. Rather, this provision exempts towage only when it is done by a rail or motor carrier or for a rail, motor or water carrier subject to the Act. As the district court stated (R. 129), this provision "which expressly excludes certain kinds of towage would be meaningless if towage generally were not included." The legislative history of this Section, furthermore, indicates that Congress thought that without this provision even towage performed for other carriers would be subject to the Act.[14]

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[14] As originally reported out to, and passed by, the Senate, the bill which ultimately became the Transportation Act of 1940 exempted towage performed for other common carriers. S. Rep. No. 433, 76th Cong., 1st sess., p. 8; 84 Cong. Rec. 5963. The bill when first reported to the House of Representatives contained a provision which exempted towage performed by a rail or motor carrier, but not towage performed by another for any other type of carrier. H. Rep. No. 1217, 76th Cong., 1st sess., p. 19. The language now found in Section 303 (f) (2) and excluding towage performed for other carriers, had its genesis in an amendment proposed by Congressman Wadsworth in the debates before the House (84 Cong. Rec. 9985-9986). The following statement clearly indicates that this Congressman thought that all those furnishing towage under the language as it then stood were common carriers by water (84 Cong. Rec. 9985):

Apparently, the Congressional desire to prevent such a result in that limited case was merely another manifestation of the same legislative intent

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Now I want to call the attention of the chairman of the committee to this situation and see if I am wrong about it. I doubt if the committee ever gave it any consideration. I will have to cite an example of the practices of inland water carriers. For example, A and B are both common or contract carriers, as the case may be, subject to this act. A has a tow of barges bound downstream on the Mississippi River, and that tow is delayed by weather conditions. It may be a couple of days late. This same A also has in New Orleans Harbor a tow of, we will say, six barges already laden, waiting to be forwarded north-bound by the powerboat which is bringing the downstream barges with it, and which is 2 days late. A does not want to delay the upstream voyage of the barges he already has loaded in New Orleans.

He has no other towboat of his own except the towboat which is bringing downstream barges, which is 2 days late. What does he do? He communicates with another carrier named B, who has an idle towboat at New Orleans and he contracts with carrier B for the use of that towboat to start those barges, already laden in New Orleans, upstream to get them going on time. Then when the upstream load of barges meets the downstream load of barges the two towboats interchange and B's contracted towboat takes the downstream-bound barges back to New Orleans and the other towboat goes on upstream with the barges which left New Orleans on their way upstream.

This bill prevents that, and why it does I cannot understand, for this bill provides that B's towboat, which is contracted for by A, is itself a common carrier. As a matter of fact, it is merely hired for a special purpose for a short time, and

which this Court has found existed under Part II of the Act to prevent the accrual of multiple "grandfather" rights on the basis of a single transportation service. *United States* v. *Rosenblum Truck Lines,* 315 U. S. 50, 53–54. It may well be, as Cornell urges (Br. 22), that the effect of this provision is to give the Commission more limited jurisdiction over those performing incidental towage services for water carriers, than it has been held to have with respect to those performing other incidental services for railroad car-

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things like that are happening on the inland waterways hundreds and hundreds of times.

My amendment proposes to strike out this language, substitute new language which will limit the regulation at least within reasonable bounds, and it reads:

"Persons acting in the capacity as agents for common carriers by water, subject to this act, in providing towage floatage, lighterage, car, ferry, or transfer or terminal operations, shall not be deemed common carriers by water, but each such operation shall be deemed to be that of the carrier for which it is performed."

Though this proposed amendment was rejected at that time (84 Cong. Rec. 9986), on the next day Congressman Lea, in charge of the bill, offered amendments which were stated to be "in substance" the Wadsworth amendments and "to carry out the purpose we had in the discussion on the Wadsworth amendment" (84 Cong. Rec. 10112). These amendments which brought the language virtually into its present form, were then adopted. (84 Cong. Rec. 10112–13). This language was retained by the Conference Committee, except that it was placed in a different Section. H. Rep. No. 2832, 76th Cong., 3d sess., p. 83.

riers. Cf. *Union Stockyard Co.* v. *United States*, 308 U. S. 213. But that does not militate against the conclusion that towage performed for others than carriers, and thus not within the exemption, is not subject to the Act. Cornell's operations with which we are concerned here are of this latter type and therefore must be considered "transportation."[15]

Section 302 (e) furnishes evidence that Congress did not consider the actual carriage of goods in a particular vessel as an essential element of "transportation" in the statutory sense. That section provides that the furnishing of a vessel under charter to another, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute the person furnishing the vessel as engaging in transportation as a contract carrier. See Appendix, *infra*, p. 66.

We submit that it is now plain that Cornell does "engage in transportation" within the meaning of the Act. But both Cornell (Br. 23–24) and the Boston Tow Boat Company (Br. 8–14) urge that towers cannot be considered subject to Part III even though they do engage in transportation, unless they do so as "water carriers."

[15] Cornell's operations are totally unlike those considered in *Union Barge Line*, 250 I. C. C. 689, to which Cornell refers (Br. 15, 24). There, the towage was found to have been performed for a common carrier by water as an incident of the latter's transportation, and it was thus clearly within the exemption of Section 303 (f) (2).

And Cornell (Br. 11–20) contends that towers, who furnished motive power for the cargo-carrying vessels of others, were not considered, for certain purposes, carriers at common law, and therefore should not be considered subject to this Part.

It may be admitted at the outset that towers were not held by the courts at common law to the strict rule of liability of a common carrier.[16] Nor have towers generally been held to be within the provisions of Section 3 of the so-called Harter Act which limits the liability of "the owner of any vessel transporting merchandise or property."[17] However, as this Court has recognized, whether and to what extent a company is subject to a statute regulating the transportation activities of common carriers, must be determined by reference to the language of the particular statute, rather than by any common law rule of liability. *Stimson Lumber Co.* v. *Kuykendall*,[18]

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[16] *Stevens* v. *The White City*, 285 U. S. 195, 200; *The Margaret*, 94 U. S. 494; *The Webb*, 14 Wall. 406; *The Kunkle Bros.*, 211 Fed. 540 (N. D. O.).

[17] *The Murrell*, 200 Fed. 826 (D. Mass.); *Bradley* v. *Lehigh Valley R. Co.*, 145 Fed. 569 (S. D. N. Y.); cf. *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326.

[18] This case established the constitutional validity of a Washington statute regulating water towers of logs as common carriers. The Court there said (275 U. S. 207, 211):

> The rule that towboats not having exclusive control of vessels towed are not to be held to the strict liability of common carriers does not affect the question under consideration. * * *

275 U. S. 207, 211; *United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296, 304; *Cleveland & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588, 593. And, more specifically, the inappositeness of common law precedents dealing with the liability of towers, in determining their status under Part III of the Interstate Commerce Act, is indicated by the language of Section 320 (d) [19] of the Act.

As the district court appropriately observed in this connection (R. 130):

> * * * in § 320 (d) Congress showed that it had in mind the difference between the question of liability and that of regulation. By labeling persons such as plaintiff "common carriers" in this Act, they do not become such for all purposes. This is made clear by § 302 which, in so labeling them, expressly states that it does so "for the purposes of this Act." * * *

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[19] This section provides:

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.

In view of this Section, and in view of the fact that Part III does not deal at all with the question of carrier liability except as to reparation awards in the case of carriers on the high seas or Great Lakes or via the Panama Canal (Sec. 308 (a), (b)), a finding that towers are subject to Part III would not affect their general liability for loss or damage.

The statutory definition of "water carrier" makes it very plain that Congress did not mean to limit the application of this Part to those who might traditionally have been considered common carriers. As we have pointed out, under the statutory definition, the term "water carrier" means a "common carrier by water, or a contract carrier by water." "Common carrier by water," in turn, means "any person which holds itself out to the general public to engage in the transportation by water," and "contract carrier by water" means "any person which, under individual contracts or agreements, engages in the transportation * * * by water." This language does not say that only those engaging in transportation as carriers, or as common carriers, as understood at common law, shall be subject to Part III. Instead, from this language it is manifest that Congress intended that all those who furnished transportation service to the general shipping public or some part of it should be considered subject to Part III as "water carriers." Congress, in effect, has adopted substantially the same test for determining who is a carrier subject to Part III, as this Court has applied in determining who is a carrier subject to Part I dealing with railroads.

Thus, in *Union Stock Yard Co.* v. *United States*, 308 U. S. 213, 220, this Court held that a company furnishing facilities for the loading and unloading of livestock at a public stockyard was engaged

in transportation by railroad, and that since such service was furnished as part of a *public calling*, the company was a carrier subject to Part I. The Court there distinguished (308 U. S. 213, 221) its earlier holding in *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434,[30] that a company leasing refrigerator cars was not a carrier subject to Part I, on the ground that the company was not engaged in a "public calling." It pointed out (308 U. S. 213, 220) that the character of the service in its relation to the public determines whether the calling is a public one. Inasmuch as Cornell's transportation is performed for shippers who own or operate the scows or barges used in carrying their own merchandise (R. 26), it is engaged in a "public calling," and also either "holding out to the public" or dealing "under individual contracts and agreements" with the shipping public, within the meaning of Part III. Consequently, it is either a "common carrier by water" or a "contract carrier by water,"[31] and in either event a "water carrier" subject to that Part. Such a holding is not at all inconsistent with the Commission's holding in *Status of Wharfingers*, 251 I. C. C. 613, that wharfingers were not subject to the Act despite the fact that they fur-

[30] The *Ellis* case was recently followed in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 428–429.

[31] Whether Cornell is a "common" or "contract" carrier is discussed *infra*, pp. 39–46.

nished transportation service to the general public. As the district court pointed out (R. 129), the Commission reached that conclusion because the legislative history peculiar to wharfingers showed a clear Congressional intent that they be excluded.

Finally, numerous administrative and judicial decisions[22] under Part I of the Act and other federal regulatory Acts with respect to comparable situations concerning railroads, afford strong support for the Commission's conclusion that towers are "water carriers" engaged in "transportation." The *Union Stock Yard* case (308 U. S. 213), *supra*, presents a good example of a situation where a company which certainly did not carry anything in the traditional sense was, nevertheless, held to be a carrier within the meaning of Part I. Perhaps more pertinent are the several decisions of the Interstate Commerce Commission holding that switching-line companies furnishing only locomotives to haul the cars of others and having no cars of their own are engaging in railroad transportation as common carriers within the meaning of Part I. *Aluminum Corp. of America* v. *Massena Terminal Railroad Co.*, 69 I. C. C. 119; *New York Dock Ry.* v. *B. & O. R. R.* 73 I. C. C. 656; *Excess Income of Brooklyn East-*

[22] As previously suggested (*supra*, pp. 23–26), these precedents are very significant in construing Part III.

ern District Terminal, 94 I. C. C. 577. This Court has also held that the Brooklyn Eastern District Terminal was a "common carrier engaged in the transportation of property by railroad" within the meaning of the Hours of Service Act although "the thing which it undertakes to carry is contained only in cars furnished by the railroad companies." *United States* v. *Brooklyn Eastern District Terminal*, 249 U. S. 296, 305. Similarly, it has frequently been held that companies merely hauling the cars of others at an arbitrary charge per car are "common carriers engaged in interstate commerce by railroad" within the meaning of the Safety Appliance Act. *United States* v. *California*, 297 U. S. 175; *Belt Ry. Co. of Chicago* v. *United States*, 168 Fed. 542 (C. C. A. 7); *Union Stockyards Co. of Omaha* v. *United States*, 169 Fed. 404 (C. C. A. 8). See also under other Acts *United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556 (C. C. N. D. Ia.) ("28-hour law" dealing with the confinement of cattle before unloading); *McNamara* v. *Washington Terminal Co.*, 37 App. D. C. 384, 394 (Federal Employers' Liability Act of 1906).

B. THE COMMISSION'S HOLDING THAT CORNELL WAS A COMMON CARRIER RATHER THAN A CONTRACT CARRIER WAS CORRECT

As to whether Cornell was a common, rather than contract, carrier, Division 4 reached the following conclusion (R. 41), in which the full Commission concurred (R. 54):

> We find that the evidence discloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, in itself constitutes one a common carrier.

It is obvious from this statement that the prescribed statutory formula for determining whether Cornell was a common or contract [*] carrier was applied in this case, for Section 302 (d) of Part III defines a common carrier by water as "any person which holds itself out to the general public to engage in the transportation by water * * *."

That there was substantial evidence in the record to support this conclusion is apparent from the following excerpt from the Division's report (R. 40–41):

> The test of a common carrier is whether it transports for the public generally. The evidence of record on that subject is, in part, as follows:

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[*] Section 302 (e) defines contract carriers by water as follows:

> The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

Question: Within the range of your operation, with credit considerations being favorable, contents of the barges being what you think they should be, will you tow for any one seeking your services?

Answer: We are like to, yes. [R. 98.]

* * * * *

Answer: We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 percent of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price, and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed. [R. 102.]

* * * * *

Answer: We have some on the blacklist, whom we do not tow, because we know that they don't pay. [R. 103.]

* * * * *

Question: But if there is some boat owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet?

Answer: Surely—if he gives us an order for it before the tow starts.

Witness [Cornell's president] further testified [R. 102] that in the tows that leave

New York nightly for up-river points "we have practically no limits; we take all that will come"; and explained that by "all that will come" he meant, "individual customers or people who have made arrangements with us. * * * We must have the order for the barge before the barges leaves the stake boat." [R. 102, 103.] He further testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: "We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price." [R. 108.] Sometimes prepayment of charges has been required. [R. 108.] As to the breadth of applicant's willingness to transport: Witness testified that "Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract, and show him what kind of service we can give, and he gives us the contract." [R. 102.] And again, respecting the daily towing schedules: "The business has been going on for so long that everybody knows it." [R. 105.]

Since the Commission applied the correct legal test prescribed by Section 302 (d), and since its factual determination that there was a public holding out by Cornell is supported by substantial

evidence, the determination is binding upon this Court even though this Court might have reached a different conclusion. Cf. *Noble* v. *United States*, 319 U. S. 88. The district court so held (R. 131), and such is the familiar rule with respect to matters entrusted to determination by an administrative agency. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *United States* v. *Maher*, 307 U. S. 148, 153–154; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546; *Alton R. Co.* v. *United States*, 315 U. S. 15, 23; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94.

It is suggested (Cornell Br. 38) that Cornell does not contract on a common carrier basis, since under its contracts it seeks to avoid liability for its negligence. But, as the Commission held (R. 40), and as this Court has often said, this is immaterial, since a person is a common carrier by virtue of his occupation, not by virtue of the responsibility under which he rests. *Liverpool & G. W. Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 440; *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211–212.

Likewise, the fact that Cornell made separate contracts with each of its customers did not mean that its business was done "under individual contracts or agreements" so as to make it a "contract carrier" within the meaning of Section 302 (c) of Part III (see fn. 23, p. 40, *supra*). As the

Commission pointed out (R. 40), "The ordinary bill-of-lading issued by common carriers generally on every shipment transported is an individual contract covering the transportation of an individual shipment." The Commission has consistently construed the identical phrase, "under individual contracts or agreements" contained in the definition of "contract carrier by motor vehicle" in Part II as referring to specialization either in the nature of the physical operations or in respect to the shippers served. *N. S. Craig Contract Carrier Application,* 31 M. C. C. 705, 712;[24] *Doyle Transfer Co., Inc. Contract Carrier Application,* 32 M. C. C. 234, 236–237. This test was judicially sustained in *Doyle Transfer Co.* v. *United States,* 45 F. Supp. 691, 694–695 (D. D. C.) in which the Commission's decisions and the legislative history were

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[24] The Commission there said:

> The specialization which we have in mind may consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper, such, for example, as the furnishing of equipment especially designed to carry a particular type of commodity, the training of employees in the proper handling of particular commodities, or the supplying of related nontransportation services such as the assembling, placing, or servicing of machinery. Or it may consist of nothing more than the devotion of all of a carrier's efforts to the service of a particular shipper, or, at most, a very limited nomber of shippers, under a continuing arrangement which makes the carrier virtually a part of the shipper's organization.

carefully analyzed. See also *Fordham Bus Corp. v. United States*, 41 F. Supp. 712 (S. D. N. Y.). Furthermore, the Commission has employed the same test in determining whether one is a common or contract carrier under Part III. *Pontin Lighterage & Transportation Corporation Application*, 250 I. C. C. 441, 446; *Southern Transportation Co. Contract Carrier Application*, 250 I. C. C. 453, 455; *Moran Towing & Transp. Co. Inc., Applications*, 250 I. C. C. 541, 545). And the evidence here reveals that Cornell does not conduct specialized operations so as to make it a contract carrier within this test.

Cornell also urges (Br. 38) that at any rate it could not be considered to have been holding itself out as a common carrier on the "grandfather" clause date, January 1, 1940, since that date was several months prior to the adoption of the statutory definition, and at that time it was doing business in the well-established status of a "non-carrier." The district court effectively answered this argument when it said (R. 130):

> But clearly what Congress meant was that a person is entitled to such a certificate if, on the specified date before the enactment of the legislature, it had been engaged in activities which, after the statute went into effect, would constitute it a common carrier.
>
> * * * * *
>
> Note that the "grandfather" clause of Part II, as to motor carriers, § 206 (*f*), is

identical in language with § 309 (f) and see *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23; cf. *Fordham Bus Corp.* v. *U. S.*, 41 Fed. Supp. 712.

C. THE CONSTRUCTION OF PART III AS MAKING CORNELL A COMMON CARRIER BY WATER DOES NOT DEPRIVE IT OF PROPERTY WITHOUT DUE PROCESS OF LAW

The Commission's construction of the statute as making Cornell a "common carrier by water" does not, as Cornell asserts (Br. 20–23), render it unconstitutional so far as Cornell is concerned. Cornell's contention is based upon several decisions of this Court,[28] condemning, as in violation of the due process clause of the Fourteenth Amendment, attempts by legislative fiat to convert private contract carriers into common carriers and subject them to various forms of economic regulation more appropriate to common carriers. Also, it is stated that the general status of towers as "noncarriers" was so definitely established that Congress was without constitutional power to label them carriers for regulatory purposes.

In answer, it may first be said that Part III does not at all purport to convert that which was a contract carrier into a common carrier, unlike the situation in the above cases. The two categories are carefully preserved; they are subjected

[28] The decisions particularly relied upon are *Michigan Commission* v. *Duke*, 266 U. S. 570; *Frost Trucking Co.* v. *R. R. Commission*, 271 U. S. 583; *Smith* v. *Cahoon*, 283 U. S. 553.

to different degrees of regulation; and what is substantially the common law test of determining into which category a particular carrier falls is also preserved. In applying this test, the Commission held that on all the facts Cornell was holding out to the public to transport and was therefore a common rather then a contract carrier (Section 302 (d), (e)). Determinations by it under the identical language of Part II in which it differentiated between common and contract carrier much as it did here, have been held not to do unconstitutional violence to common law concepts within the theory of the cases upon which Cornell relies. *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 715 (S. D. N. Y.); *Doyle Transfer Co.* v. *United States*, 45 F. Supp. 691, 696-697 (D. D. C.). In any event, as the district court indicated in Judge Frank's opinion[*] (R. 129), subsequent decisions of this court in *Nebbia* v. *New York*, 291 U. S. 502, and *Olsen* v. *Nebraska*, 313 U. S. 236, involving economic regulation by the States, have rejected the theory upon which these earlier carrier cases cited by Cornell were based. These subsequent decisions establish that the category of "business affected with a public interest," and which may be constitutionally subjected to State economic regulation, as, *e. g.*,

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[*] Judge Frank reached the same conclusion in considering Part II of the Interstate Commerce Act in *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 715 (S. D. N. Y.).

price-fixing regulation,[21] is not a closed category. Certainly the power of Congress under the commerce clause to subject a business to economic regulation is as least as broad, so far as due process of law is concerned, as that of the States to do so under their police power. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 582; *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, this Term, pamphlet p. 7. Also, while towboats have in the past been regarded as "non-carriers" so far as liability was concerned,[22] it has specifically been held by this Court that this consideration is no constitutional bar to their being subjected to regulation as "common carriers." *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211.

II

THE COMMISSION RIGHTLY HELD THAT CORNELL'S TRANSPORTATION WAS IN INTERSTATE COMMERCE

As to at least 4.4 percent of its business, which involves towing of barges from New York points to New Jersey destinations in the New York Harbor area (R. 26, 91, 98), Cornell does not deny

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[21] Rate-making, the heart of Part III, is but one species of price-fixing. *Federal Power Commission* v. *Hope Natural Gas Co.*, Nos. 34 and 35, this Term, pamphlet p. 7.

[22] As pointed out in the *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, this non-carrier liability rule is based merely on the fact that towboats do not have exclusive control of the vessels towed.

that it is engaged in interstate commerce. But it contends that the Commission erred in holding that the remainder of its business, which concededly involves towage by it between two New York State points, was, nevertheless, "interstate commerce" within the meaning of Part III, because Cornell's vessels traversed the territorial waters of New Jersey in transit."

It is said (Cornell Br. 34) that there is no evidence in the record that Cornell's vessels in plying between New York points do in fact pass through New Jersey waters. From the Commission's report, it appears that by compact between New York and New Jersey, approved by Congress on June 28, 1834,[10] the boundary between the two states was fixed as the middle of the Hudson River (R. 51). However, that same agreement gave to the State of New York exclusive jurisdiction over

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[9] The Commission, in view of its holding that all of Cornell's operations between New York points were in interstate commerce, did not have to consider whether such operations were interstate to the more limited extent that they involved situations where the vessels towed or their cargoes were moving in interstate commerce. The record does not show what part of Cornell's traffic is of such nature, although it does indicate that some of it is (R. 100). It is established by a long list of cases beginning with *The Daniel Ball*, 10 Wall. 557, that such commerce in any event is interstate. See also, for example, *B. & O. S. W. R. Co.* v. *Settle*, 260 U. S. 166; *Trojan Powder Co.* v. *Director General*, 88 I. C. C. 447; *Delaware & Hudson Boat Lines*, 40 I. C. C. 297.

[10] The provisions are set forth in 4 Stat. 708–711.

all the waters of the Hudson west of Manhattan Island and south of Spuyten Duyvil creek, subject to certain property rights retained by New Jersey[21] (R. 51–52). The Commission's report further states in this connection (R. 52–53):

> From the north end of Manhattan Island northward to the point where the northern boundary of New Jersey reaches the Hudson River is some 7 or 8 miles. Applicant therefore asserts that only for this distance would its traffic be outside the waters that are under the jurisdiction of the State of New York. It is not necessary for us to pass upon the question of whether the movement of applicant's traffic through the waters of the western half of the Hudson River lying west of Manhattan Island constitutes it interstate commerce, although this applicant in *Cornell Steamboat Co.* v. *Sohmer* [235 U. S. 549], *supra*, contended that it was such, since concededly movement through the waters of the western half of the river north of Manhattan Island is through waters under the jurisdiction of the State of New Jersey. The interstate character of applicant's traffic is determined, not by the number of miles that it moves outside the State

[21] The agreement (4 Stat. 711) further provides:
That nothing therein contained shall be construed to impair or in any manner affect, any right of jurisdiction of the United States in and over the islands or waters which form the subject of the said agreement.

of New York, but by the fact that it *does* move outside the State.

In view of the admissions made by Cornell's counsel,[*] any contention that its vessels in operating

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[*] The following excerpts from Mr. Erskine's letter of January 21, 1944 (printed in full in the Appendix, *infra*, pp. 75–77) are pertinent:

> 1. In the 7-mile stretch of the Hudson River between the northerly end of Manhattan and a point about opposite Hastings, the Cornell tows generally navigate on the easterly, or New York side of the center of the river, where the deep water channel is. They may occasionally navigate in that stretch on the westerly side of the center because of traffic or weather conditions, but it is pure chance if they do.
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> 2. In the area of the Hudson River below the northerly end of Manhattan, southbound tows, in order to make their usual landings at the New York piers, against the ebb tide, maneuver on the westerly side of the center of the river in order to have room in which to round up.
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> 3. Northbound Cornell tows usually start away from the Cornell stakeboat which is moored on the westerly side of the area of the river opposite Manhattan, and in that respect the practice is still the same as referred to in the Sohmer case, 235 U. S. 549.

As appears from the following statement describing its operations in the *Sohmer* decision, 235 U. S. 549, 557, Cornell at that time plainly operated in New Jersey:

> Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken out to the

between New York points do not, contrary to the findings of the Commission, in fact pass through New Jersey waters, can have no merit.

The Commission's construction of Part III as embracing such operations within the phrase "interstate commerce" was clearly correct. Under that Part, "transportation in interstate * * * commerce" is defined in Section 302 (i) (1) to mean "transportation of persons or property wholly by water from a place in a State to a place in another State, whether or not such transportation takes place wholly in the United States." It is also provided in Section 303 (k) that "nothing in this part shall authorize the Commission to prescribe or regulate any rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing

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stakeboats and there made fast, and the tow is there made up, the towing vessels are attached, and the course pursued by the steamers in going up the river is in the Territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn. Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York and New Jersey, to such extent as the State of New Jersey is included in the Hudson River and New York Bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State. * * *

discrimination against interstate commerce or for any other purpose." As the district court pointed out (R. 131), Cornell's operations fall even within the literal meaning of the statutory definition of transportation in interstate commerce since "it transports from a 'place' in the waters of New York to a 'place' in the waters of New Jersey." See also *Galveston etc. Ry. Co.* v. *Woodbury*, 254 U. S. 357, 359, 360.

The language of Part I dealing with railroads is virtually identical. Section 1 (1) (c) confers jurisdiction over railroad transportation "from one State * * * to any other State." It is further provided in Section 1 (2) (a) that the provisions of Part I do not apply to transportation of property "wholly within one State and not shipped to or from a foreign country from or to any place in the United States." That language was construed, both by the Commission and the courts, many years before the passage of Part III as giving the Commission jurisdiction of rail transportation beginning in one state, running through a second state, and returning to the first state. *Wells-Higman Co.* v. *St. L., I. M. & S. Ry. Co.*, 18 I. C. C. 175, 176; *Willman & Co.* v. *St. L., I. M. & S. Ry. Co.*, 22 I. C. C. 405; *Security Cement & Lime Co.* v. *Baltimore & Ohio Railroad Co.*, 113 I. C. C. 579; *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404; *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269, 271–272 (C. C. S.

D. N. Y.). It is true that in the case last mentioned, the court said (152 Fed. 269, 272) that its interpretation was strengthened by the fact that Section 1 (2) (a) in Part I provides that jurisdiction over railroads shall not apply "to the transportation * * * wholly within one State." But Section 303 (k) in Part III similarly precludes jurisdiction as to water carriers over "intrastate transportation." And, as both the Commission and the district court stated (R. 38, 132), if the words "wholly within a State" in Part I fortify the conclusion that the Commission has jurisdiction under Part I over transportation between points in a single state through another state, the similar language contained in Section 303 (k)[22] fortifies a similar conclusion under Part III. This Court, furthermore, has only recently held that where Congress in the Transportation Act of 1940 chose to make identical language applicable to two different types of transportation, it must be considered to have intended that the same construction of the Act be applied to both types. *McLean Trucking Co.* v. *United States*, No. 31, this Term, pamphlet, p. 9. And especially should the jurisdictional provisions of Part III be given a construction consonant with that given the similar railroad provisions in view of the aforementioned general legislative purpose in the

[22] The district court inadvertently referred to this Section as Section 303 (h) (R. 132).

Transportation Act of 1940 to promote equality of regulation between railroads and other forms of transportation. (See pp. 24–26, *supra*.)

Cornell points to certain difference in language in Part II dealing with motor carriers as indicating the incorrectness of the present construction under Part III. Section 203 (a) (10) of Part II, which was first adopted in the original Motor Carrier Act of 1935 (49 Stat. 544) and retained in the Transportation Act of 1940, defines "interstate commerce" to mean "commerce between any place in a State and any place in another State or between places in the same State through another State." Though this language indicates more specifically than the language of Part III, that interstate commerce under Part II included transportation of the present type, still this does not establish that Congress intended a different result under Part III. As the district court held (R. 132–133), Congress must be deemed to have known in 1940 that the courts had held the language employed in Part I had precisely the same meaning as that in Part II. Congress then had a choice of two methods of expressing the same intention. Therefore, no significance can be given to the fact that when it enacted Part II in 1940, it selected the language which it had used in Part I rather than that used in Part II.

The construction of Part III for which Cornell contends must be rejected also because it would

lead to other incongruous results. As the Commission stated (R. 39):

> Taking one illustration: If we were to find that we cannot regulate transportation by water between two points in the same State which passes through another State enroute, we would be in the position of saying that because the origin and destination are in the same State we have no jurisdiction over through all-water shipments from Chattanooga, Tenn., on the Tennessee River, to Memphis, Tenn., on the Mississippi River, although the route extends from Tennessee through Alabama, back through Tennessee, and through Kentucky to the Ohio River, thence on the Ohio along the border between Illinois and Kentucky to Cairo, Ill., thence on the Mississippi bordering Kentucky, Missouri, Arkansas and Tennessee; but at the same time asserting jurisdiction over transportation between intermediate points on the same route where origin and destination are in different States; in other words, that we can regulate the rates for the several interstate *parts* of the transportation, but cannot regulate the rates for the through interstate transportation which is comprised of such parts. The through transportation would thus be left subject to no regulation whatever. *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404.

Cornell places much reliance (Br. 35–36) upon this Court's decision in *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 560. There the Court held that operations by Cornell such as it still conducts today, contrary to its own contentions at that time, were not "interstate *commerce, excluded from the taxing power of the State*, because as to a part of the journey the course is over the territory of another State." [Italics supplied.] Consequently, it was held that a New York tax on the privilege of engaging in the transportation business in corporate form, did not, as applied to Cornell, amount to an unconstitutional burden upon interstate commerce.

But, it is plain from this language that the Court was not there making a general finding that for all purposes Cornell's operations were not interstate commerce, but only that they could not be considered such insofar as the question of the impact of the state tax upon them was concerned. This is further emphasized by an examination of the setting of the case. In the *Sohmer* case, the Court relied (235 U. S. at p. 560) upon *Lehigh Valley Railroad Co.* v. *Pennsylvania*, 145 U. S. 192, and *Ewing* v. *Leavenworth*, 226 U. S. 464. These cases likewise both sustained the validity of state taxes on carriers passing from the taxing state through another state and back into the taxing state. But in the *Ewing* case (226 U. S. at

p. 468), it was clearly recognized that the result in these tax cases was not controlled by cases such as *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, wherein state attempts to regulate, rather than tax, commerce of this same type had been held to be unconstitutional interferences with interstate commerce. See also *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17. In the *Hanley* case, the Court also made it clear that the tax cases were to be confined to the tax field, distinguishing the *Lehigh Valley* case in the following language (187 U. S. at p. 621):

> That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. * * * And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. * * *

The inapplicability of the *Sohmer* case to the regulatory field is thus plainly apparent. And especially is this true where, as here, the problem is not one of the state's power to interfere with federal control of interstate commerce, but in-

stead the scope to be given to a federal statute regulating such commerce. As this Court has repeatedly held, a state's power to tax and regulate is not the terminal boundary of federal power and merely because something is subject to state taxation it is not necessarily also immune from federal regulation under the Commerce Clause. *Swift & Co.* v. *United States,* 196 U. S. 375, 400; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 311; *Wickard* v. *Filburn,* 317 U. S. 111, 120–122; see also *Polish National Alliance* v. *National Labor Relations Board,* 136 F. 2d 175, 179 (C. C. A. 7), now on certiorari to this Court, No. 226.

In conclusion, it should be noted that under this Court's decision in *Gray* v. *Powell,* 314 U. S. 402, the Commission's construction of the statute is entitled to great weight. Especially is this true where, as here, "the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." *United States* v. *American Trucking Associations,* 310 U. S. 534, 549. The Transportation Act of 1940 is plainly a broad remedial statute to be given a liberal construction against those claiming to be exempt from its provisions. *McDonald* v. *Thompson,* 305 U. S. 263, 266.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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FEBRUARY 1944.

APPENDIX

Part I of the Interstate Commerce Act, as amended by the Act of September 18, 1940, 54 Stat. 899, sets forth the National Transportation Policy as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (49 U. S. C. 1.)

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Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (1) provides:

> That the provisions of this part shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—
>
> From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States. (49 U. S. C. 1 (a), (b).)

Section 1 (2) provides in part:

> The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply—
>
> (a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly

within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid; (49 U. S. C. 1 (2).)

Section 1 (3) provides:

(a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, co-

partnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

(b) For the purposes of sections 5, 12 (1), 20, 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control. (49 U. S. C. 1 (3).)

Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 543, as amended.

Section 203 (a) (10) provides:

The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water. (49 U. S. C. 303 (a) (10).)

Section 203 (a) (14) provides:

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or

property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I. (49 U. S. C. 303 (a) (14).)

Section 203 (a) (15) provides:

The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation. (49 U. S. C. 303 (a) (15).)

Part III of the Interstate Commerce Act, September 18, 1940, c. 722, 54 Stat. 929.

Sec. 302 provides in part:

(c) The term "water carrier" means a common carrier by water or a contract carrier by water.

(d) The term "common carrier by water" means any person which holds itself out to the general public to engage in the transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, except transportation by water by an express company subject to part I in the conduct of its express business, which shall be considered to be and shall be regulated as transportation subject to part I.

(e) The term "contract carrier by water" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of "contract carrier by water." Whenever the Commission, upon its own motion or upon application of any interested party, determines that the application of the preceding sentence to any person or class of persons is not necessary in order to effectuate the national transportation policy declared in this Act, it shall by order exempt such person or class of persons from the provisions of this part for such period of time as may be specified in such order. The Commission may by order revoke any such exemption whenever it shall find that the application of such sentence to the exempted person or class of persons is necessary in order to effectuate such national transportation policy. No such exemption shall be denied or revoked except after reasonable opportunity for hearing.

(f) The term "vessel" means any watercraft or other artificial contrivance of

whatever description which is used, or is capable of being, or is intended to be, used as a means of transportation by water.

(g) The term "transportation facility" includes any vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrumentality or equipment of any kind, used in or in connection with transportation by water subject to this part.

(h) The term "transportation" includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, elevation, transfer in transit, refrigeration or icing, ventilation, storage, and handling of property transported or the interchange thereof with any other agency of transportation.

(i) The term "interstate or foreign transportation" or "transportation in interstate or foreign commerce", as used in this part, means transportation of persons or property—

(1) wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States;

(2) partly by water and partly by railroad or motor vehicle, from a place in a State to a place in any other State; except that with respect to such transportation taking place partly in the United States and partly outside thereof, such terms shall include transportation by railroad or motor vehicle only insofar as it takes place within the United States, and shall include transportation by water only in-

sofar as it takes place from a place in the United States to another place in the United States;

(3) wholly by water, or partly by water and partly by railroad or motor vehicle, from or to a place in the United States to or from a place outside the United States, but only (A) insofar as such transportation by rail or by motor vehicle takes place within the United States, and (B) in the case of a movement to a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein prior to transshipment at a place within the United States for movement to a place outside thereof, and, in the case of a movement from a place outside the United States, only insofar as such transportation by water takes place from any place in the United States to any other place therein after transshipment at a place within the United States in a movement from a place outside thereof. (49 U. S. C. 902 (c) (d) (e) (f) (g) (h) (i).)

Section 303 provides in part:

(e) It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment, or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form

as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. A carrier (other than a carrier subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended) making such application prior to January 1, 1941, shall be exempt from the provisions of this part until a final determination has been made upon such application if such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, for interruptions of service over which such carrier or its predecessor in interest had no control.

(f) Notwithstanding any provision of this section or of section 302, the provisions of this part shall not apply—

(1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II, incidental to transportation subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services, or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be transportation subject to part I when performed by such

carrier by railroad, and transportation subject to part II when performed by such motor carrier.

(2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to part II, or a water carrier subject to this part, in the performance within terminal areas of transfer, collection, or delivery services, or in the performance of floatage, car ferry, lighterage, or towage; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental. (49 U. S. C. 903 (e) (f).)

Section 309 provides:

(a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions

of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application.

(b) Application for a certificate shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require.

(c) Subject to section 310, upon application as provided in this section the Com-

mission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

(d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter

authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

(e) No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways.

(f) Except as otherwise provided in this section and section 311, no person shall engage in the business of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided*, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such permit is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the

standards and procedure provided for in subsection (g), and such permit shall be issued or denied accordingly. Any person, not included within the provision of the foregoing proviso, who is engaged in transportation as a contract carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a permit, and, if application for such permit is made to the Commission within such period, the continuance of such operation shall be lawful pending the determination of such application.

(g) Application for such permit shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require. Subject to section 310, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part or

those lawfully established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the development of the business and the demands of the carrier's patrons shall require. (49 U. S. C. 909.)

Section 320 (d) provides:

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part. (49 U. S. C. 920 (d).)

The letter of January 21, 1944, from Mr. Erskine, opposing counsel, reads:

JANUARY 21st, 1944.

Cornell Steamboat Company vs. *United States of America,* No. 384

Your No. 59-30—1682

WENDELL BERGE, *Assistant Attorney General,*
Department of Justice,
Washington, D. C.

DEAR MR. BERGE:

I am still unwilling to sign any such stipulation [that certain portions of Mr. Erskine's oral argument before the full

Commission be made part of the record in this case] as you suggest. It would be far from an accurate portrayal of what transpired during the two oral arguments before the Commission and the argument before the District Court. Perhaps you have failed to notice the concessions which I made on page 35 of my brief in the District Court. The following facts have never been disputed by me, and they could be established by additional testimony.

1. In the 7-mile stretch of the Hudson River between the northerly end of Manhattan and a point about opposite Hastings, the Cornell tows generally navigate on the easterly, or New York side of the center of the river, where the deep water channel is. They may occasionally navigate in that stretch on the westerly side of the center because of traffic or weather conditions, but it is pure chance if they do.

2. In the area of the Hudson River below the northerly end of Manhattan, south-bound tows, in order to make their usual landings at the New York piers, against the ebb tide, maneuver on the westerly side of the center of the river in order to have room in which to round up.

3. North-bound Cornell tows usually start away from the Cornell stakeboat which is moored on the westerly side of the area of the river opposite Manhattan, and in that respect the practice is still the same as referred to in the Sohmer case, 235 U. S. 549.

I am unable to see that those facts in any way affect my criticism of the District Court's finding No. 6. The facts on this point were not dealt with by the Examiner when the testimony was taken before him,

and were not dealt with in the argument before Division 4. The finding made by Division 4, out of a blue sky, led to the full disclosure of these facts during the reargument and in my brief before the District Court.

If you wish to say in your brief before the Supreme Court that the facts which I have stated above are not disputed, you may do so, and you may also print this letter as an appendix to your brief, if you believe that that is in order.

Very truly yours,

(s) ROBERT S. ERSKINE.

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U. S. GOVERNMENT PRINTING OFFICE: 1944